Bank Simpanan Nasional v Mutiara Smart Sdn Bhd (formerly known as Mutiara Smart Computing Sdn Bhd) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-1448–09 OF 2020
MOHD NAZLAN J
24 AUGUST 2021

Civil Procedure — Striking out — Originating summons — Second defendant applied to strike out plaintiff's application for declaration of ownership — Whether claim was obviously unsustainable — Whether second defendant was privy to sale transaction between plaintiff and first defendant — Whether plaintiff has valid cause of action in law against second defendant — Whether plaintiff's claim frivolous, vexatious, delayed fair trial and was abuse of court process — Rules of Court 2012 O 18 r 19

Civil Procedure — Parties — Application for declaration — Plaintiff applied for declaration of ownership of computer equipment — Whether first defendant had title to sell equipment — Whether sale of computer equipment by first defendant to plaintiff void — Whether principle of nemo dat quod non habet applied — Whether plaintiff's conduct precluded it from disputing first defendant's authority to sell — Whether plaintiff was bona fide purchaser for value — Whether plaintiff acquired good title — Whether concept of laches applied — Whether delay in filing suit caused prejudice to first defendant — Whether declaratory orders should be granted — Sale of Goods Act 1957 s 27(1)

This was the plaintiff's originating summons for principally, a declaration of ownership of certain computer equipment against the two defendants and the striking out application filed by the second defendant against the said originating summons pursuant to O 18 r 19(1)(b), (c) or (d) and/or O 92 r 4 of the Rules of Court 2012. By way of an offer dated 30 October 2012, the second defendant, as owner, rented 1,400 units of computer equipment to the first defendant for a period of 36 months. The rental was subsequently extended until 29 January 2016 and further extended until 29 January 2017. The first defendant had also sublet the said 1,400 units of computer equipment to the plaintiff, pursuant to a leasing agreement dated 26 September 2012 between the first defendant and the plaintiff. The plaintiff and the first defendant subsequently entered into a sale and purchase of the certain desktop equipment where the former purchased from the latter, 2,140 units of computer equipment, being 1,785 units of desktop and 355 units of laptop at the sale price of RM1,590,000. Subsequently, the first defendant had failed to pay the agreed rental to the second defendant in the further extension of the

rental of the 1,400 units of computer equipment. In consequence thereof, the second defendant issued to the plaintiff, which then had possession of the 1,400 computer equipment, a letter dated 21 February 2017 entitled 'notice of repossession order' informing the plaintiff that the first defendant had defaulted in the rental payment and that the second defendant would take possession of the 1,400 units of computer equipment from the plaintiff. This was when the plaintiff first discovered that the second defendant was the owner of the 1,400 units of computer equipment which had been leased then sold to the plaintiff by the first defendant and that the equipment had been initially rented to the first defendant and subrented to the plaintiff by the first defendant. The plaintiff replied to the second defendant's letter contending that the former had never entered into any contract with the latter in relation to the 1,400 units of computer equipment, that the second defendant and/or its agent had no right to enter any of the plaintiff's premises to repossess all or any of the computer equipment at any time, and that the plaintiff would rigorously defend any legal action instituted against the plaintiff by the second defendant. Upon receipt of the plaintiff's letter, the second defendant did not proceed to take possession of the 1,400 units of computer equipment from the plaintiff. Instead, the second defendant commenced a legal suit against the first defendant for all moneys due and payable by the first defendant to the second defendant in respect of the rental of the 1,400 units of computer equipment. The second defendant succeeded and obtained judgment against the first defendant. Subsequently, the first defendant discharged all its liabilities owed to the second defendant. In July 2020, the second defendant received a letter from the plaintiff, this time requesting the second defendant to take possession of the computers. The second defendant denied the plaintiff's request. The plaintiff, therefore, proceeded to file the instant originating summons against both defendants, for a declaration that the sale of the computer equipment by the first defendant to the plaintiff was void as the first defendant did not have the title to sell the same and to compel the defendants to retrieve the equipment, failing which the plaintiff would dispose the same either by way of a sale or as scrap. The second defendant in response filed a striking out application against the plaintiff's originating summons. Among the key issues that required judicial determination were: (a) the ownership of the computers upon sale to the plaintiff; and (b) the application of the Sale of Goods Act 1957.

Held, allowing the second defendant's application; and dismissing the plaintiff's application:

(1) It was clear that whilst the first defendant had disposed of the 1,400 computer units by way of the purchase by the plaintiff in June 2016, at the time of the sale to the plaintiff, the same were owned by the second defendant since 2012 and leased back to the first defendant who became the owner only later in 2018 after the conclusion of the court proceedings

commenced by the second defendant. Thus, whilst it was true that at the time of the filing of the originating summons, ownership of the 1,400 computer units in dispute was indeed vested in the first defendant, it was the second defendant who owned the same at the time of their sale to the plaintiff by the first defendant in June 2016 (see paras 28–29).

(2) One could not pass title of what one did not own but there were certain exceptions to the strict operation of the rule. A major exception was that the owner of the goods, such as the plaintiff herein, was by his conduct precluded from denying the seller's authority to sell. On the facts of the case, the conduct of the plaintiff in informing the second defendant that the plaintiff refused to allow any repossession and would defend any attempt by the second defendant to do so prevented the plaintiff from disputing, much less denying the first defendant's authority and title to sell the said computer equipment to the plaintiff. In the result, under s 27(1) of the Sale of Goods Act 1957, the plaintiff, who was a bona fide purchaser for value without notice of the second defendant's true ownership over the 2,140 units of computers (inclusive of the 1,400), had therefore acquired good title over the said computers at the time of the sale transaction between the plaintiff and the first defendant (see paras 33 & 36–37).

(3) There was a long and inordinate delay in the pursuit of the case by the plaintiff. The starting point of knowledge in respect of the status of the ownership of 1,400 units of computers claimed by the second defendant was the receipt of the notice of repossession order of 21 February 2017. But it was after a good three years and four months later that the plaintiff had actually given notice to demand the first defendant to retrieve all the computers. The delay had also resulted in a prejudice to the first defendant because the market value of the computers had since very considerably and drastically dropped in light of the aging of the computers, their status as being used computers, and the fact that the technology employed in the said computers was no longer the latest technology available (see paras 45–46).

(4) The plaintiff had not disclosed that when sold to the plaintiff by the first defendant in 2016, only 1,400 out of the said 2,140 units of computers were owned by the second defendant. The other 740 never had anything to do with the second defendant. This originating summons of the plaintiff sought for reliefs in respect of the whole 2,140 units against both defendants in one indiscriminate broad brush. Further, despite the plaintiff claiming having to make a major purchasing and replacement exercise to acquire new computers in place of the 2,140 units, the plaintiff chose not to produce any documentary evidence of its alleged

major replacement of acquiring these new computers. The prayers for declaratory orders against the defendants therefore could not succeed (see paras 47–49).

(5) The court could not countenance a departure from the well-entrenched rule in the law of contract that a third party could neither benefit nor suffer from a contract executed by other parties. The law thus treated the second defendant as a stranger to the sale transaction of the computer units between the plaintiff and the first defendant. It was clear that the plaintiff had not shown a case against the second defendant and particularly failed to demonstrate that the second defendant had any right to any of the computer equipment or that the second defendant was a party to the agreement for the sale and purchase of the same between the first defendant and the plaintiff. The plaintiff therefore did not have a valid cause of action in law against the second defendant, and the claim of the plaintiff was predicated on a basis which was nothing better than tenuous. The plaintiff's claim for declaration on the ownership of the computers against the second defendant was frivolous and vexatious and an abuse of process. The plaintiff's claim against the second defendant was so obviously and conspicuously unsustainable and eminently suited for summary disposal by way of striking out under O 18 r 19(1) of the Rules of Court 2012 (see paras 57, 65 & 68–69).

[Bahasa Malaysia summary

Ini adalah saman pemula plaintif untuk terutamanya, satu deklarasi pemilikan peralatan komputer tertentu terhadap kedua-dua defendan, dan permohonan pembatalan yang difailkan oleh defendan kedua terhadap saman pemula tersebut menurut A 18 k 19(1)(b), (c) atau (d) dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Melalui tawaran bertarikh 30 Oktober 2012, defendan kedua, sebagai pemilik, menyewakan 1,400 unit peralatan komputer kepada defendan pertama untuk tempoh 36 bulan. Penyewaan tersebut kemudiannya dilanjutkan sehingga 29 Januari 2016 dan dilanjutkan lagi sehingga 29 Januari 2017. Defendan pertama juga telah menyewakan 1,400 unit peralatan komputer tersebut kepada plaintif, menurut perjanjian sewaan bertarikh 26 September 2012 antara defendan pertama dan plaintif. Plaintif dan defendan pertama kemudiannya memasuki penjualan dan pembelian peralatan desktop tertentu di mana plaintif membeli daripada defendan, 2,140 unit peralatan komputer, iaitu 1,785 unit desktop dan 355 unit komputer riba pada harga jualan RM1,590,000. Lanjutan itu, defendan pertama telah gagal untuk membayar sewa yang dipersetujui kepada defendan kedua pada lanjutan penyewaan 1,400 unit peralatan komputer. Ekoran daripada itu, defendan kedua mengeluarkan kepada plaintif, yang kemudiannya memiliki 1,400 peralatan komputer, surat bertarikh 21 Februari 2017 bertajuk 'notis perintah pemilikan semula' memaklumkan plaintif bahawa defendan pertama telah ingkar dalam pembayaran sewa dan bahawa

defendan kedua akan mengambil milikan 1,400 unit peralatan komputer daripada plaintif. Ini adalah apabila plaintif pertama kali mendapati bahawa defendan kedua adalah pemilik 1,400 unit peralatan komputer yang telah disewa kemudian dijual kepada plaintif oleh defendan pertama dan bahawa peralatan itu pada mulanya telah disewakan kepada defendan pertama dan disewakan kepada plaintif oleh defendan pertama. Plaintif menjawab surat defendan kedua yang menegaskan bahawa defendan tidak pernah memasuki sebarang kontrak dengan defendan berhubung dengan 1,400 unit peralatan komputer, bahawa defendan kedua dan/atau ejennya tidak mempunyai hak untuk memasuki mana-mana premis plaintif untuk mengambil semula kesemua atau mana-mana peralatan komputer pada bila-bila masa, dan bahawa plaintif akan dengan tegas mempertahankan sebarang tindakan undang-undang yang dimulakan terhadap plaintif oleh defendan kedua. Setelah menerima surat plaintif, defendan kedua tidak meneruskan untuk mengambil alih 1,400 unit peralatan komputer daripada plaintif. Sebaliknya, defendan kedua memulakan tindakan undang-undang terhadap defendan pertama untuk kesemua wang yang terhutang dan kena dibayar oleh defendan pertama kepada defendan kedua berkenaan dengan penyewaan 1,400 unit peralatan komputer. Defendan kedua berjaya dan mendapat penghakiman terhadap defendan pertama. Selepas itu, defendan pertama melepaskan semua liabilitinya terhadap defendan kedua. Pada Julai 2020, defendan kedua menerima surat daripada plaintif, kali ini meminta defendan kedua mengambil alih komputer tersebut. Defendan kedua menolak permintaan plaintif. Oleh itu, plaintif terus memfailkan saman pemula semasa terhadap kedua-dua defendan, untuk satu deklarasi bahawa penjualan peralatan komputer oleh defendan pertama kepada plaintif adalah tidak sah kerana defendan pertama tidak mempunyai hak untuk menjual peralatan komputer tersebut, dan untuk memaksa defendan untuk mendapatkan semula peralatan tersebut, jika gagal plaintif akan melupuskan peralatan tersebut sama ada dengan cara jualan atau sebagai sekerap. Defendan kedua sebagai maklum balas memfailkan permohonan pembatalan saman pemula plaintif. Antara isu utama yang memerlukan dapatan kehakiman adalah: (a) pemilikan komputer semasa penjualan kepada plaintif; dan (b) pemakaian Akta Jualan Barang 1957.

Diputuskan, membenarkan permohonan defendan kedua; dan menolak permohonan plaintif:

(1) Ia adalah jelas bahawa walaupun defendan pertama telah melupuskan 1,400 unit komputer melalui pembelian oleh plaintif pada Jun 2016, pada masa penjualan kepada plaintif, ianya dimiliki oleh defendan kedua sejak 2012 dan disewakan semula kepada defendan pertama yang menjadi pemilik hanya pada tahun 2018 selepas tamat prosiding mahkamah yang dimulakan oleh defendan kedua. Oleh itu, walaupun adalah benar bahawa pada masa pemfailan saman pemula, pemilikan 1,400 unit komputer yang dipertikaikan sememangnya terletak pada

defendan pertama, ia adalah defendan kedua yang memilikinya pada masa penjualannya kepada plaintif oleh defendan pertama pada Jun 2016 (lihat perenggan 28–29).

(2) Seseorang tidak boleh melepasi hakmilik sesuatu yang tidak dimilikinya tetapi terdapat pengecualian tertentu terhadap pengendalian ketat peraturan tersebut. Pengecualian utama adalah pemilik barang, seperti plaintif di sini, adalah oleh kelakuannya dihalang daripada menafikan kuasa penjual untuk menjual. Mengenai fakta kes, kelakuan plaintif memaklumkan defendan kedua bahawa plaintif enggan membenarkan sebarang pemilikan semula dan akan mempertahankan sebarang percubaan defendan kedua untuk berbuat demikian menghalang plaintif daripada mempertikaikan, apalagi menafikan kuasa defendan pertama dan hak milik untuk menjual peralatan komputer tersebut kepada plaintif. Hasilnya, di bawah s 27(1) Akta Jualan Barang 1957, plaintif, yang merupakan pembeli bona fide dengan nilai tanpa notis mengenai pemilikan sebenar defendan kedua ke atas 2,140 unit komputer (termasuk 1,400), oleh itu telah memperoleh hak milik yang suci hati ke atas komputer tersebut pada masa transaksi penjualan antara plaintif dan defendan pertama (lihat perenggan 33 & 36–37).

(3) Terdapat kelewatan yang panjang dan melampau dalam pengemukaan kes oleh plaintif. Titik permulaan pengetahuan berkenaan dengan status pemilikan 1,400 unit komputer yang dituntut oleh defendan kedua adalah penerimaan perintah pemberian semula notis 21 Februari 2017. Tetapi selepas tiga tahun empat bulan, plaintif sebenarnya telah memberi notis untuk menuntut defendan pertama mendapatkan semula semua komputer. Kelewatan tersebut juga telah mengakibatkan prejudis kepada defendan pertama kerana nilai pasaran komputer tersebut telah menurun dengan ketara dan secara drastik memandangkan penuaan komputer, statusnya sebagai komputer terpakai, dan fakta bahawa teknologi digunakan dalam komputer tersebut bukan lagi teknologi terkini yang tersedia (lihat perenggan 45–46).

(4) Plaintif tidak mendedahkan bahawa apabila dijual kepada plaintif oleh defendan pertama pada tahun 2016, hanya 1,400 daripada 2,140 unit komputer tersebut dimiliki oleh defendan kedua. 740 yang lain tidak pernah ada kaitan dengan defendan kedua. Saman pemula plaintif ini memohon relif berkenaan dengan keseluruhan 2,140 unit terhadap kedua-dua defendan dalam satu tindakan luas yang memprejudiskan. Selanjutnya, walaupun plaintif mendakwa perlu membuat pembelian dan penggantian besar-besaran untuk memperoleh komputer baharu sebagai ganti 2,140 unit tersebut, plaintif memilih untuk tidak mengemukakan sebarang keterangan dokumentari tentang penggantian utama yang didakwa untuk memperoleh komputer baharu ini. Oleh itu,

prayer untuk perintah deklarasi terhadap defendan tidak berjaya (lihat perenggan 47–49).

(5) Mahkamah tidak boleh menerima penyimpangan daripada peraturan yang mantap dalam undang-undang kontrak bahawa pihak ketiga tidak boleh mendapat manfaat atau kerugian daripada kontrak yang dilaksanakan oleh pihak lain. Oleh itu, undang-undang menganggap defendan kedua sebagai orang asing dalam transaksi penjualan unit komputer antara plaintif dan defendan pertama. Ia adalah jelas bahawa plaintif tidak membuktikan kes terhadap defendan kedua dan terutamanya gagal untuk menunjukkan bahawa defendan kedua mempunyai apa-apa hak ke atas mana-mana peralatan komputer atau bahawa defendan kedua adalah pihak dalam perjanjian untuk penjualan dan pembeliannya antara defendan pertama dan plaintif. Oleh itu, plaintif tidak mempunyai kausa tindakan yang sah dalam undang-undang terhadap defendan kedua dan tuntutan plaintif adalah berdasarkan asas yang sama sekali lemah. Tuntutan plaintif untuk satu deklarasi mengenai pemilikan komputer terhadap defendan kedua adalah remeh dan menyusahkan serta penyalahgunaan proses. Tuntutan plaintif terhadap defendan kedua adalah sangat jelas dan ketara tidak dapat dipertahankan dan amat sesuai untuk pelupusan ringkasan dengan pembatalan di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 57, 65 & 68–69).]

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank Simpanan Nasional v Rudysham Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)

Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)

Great Eastern Life Assurance (M) Bhd v Poobalan a/l Rajah [2019] 10 MLJ 1, HC (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520, CA (refd)

Public Finance Bhd v Scotch Leasing Sdn Bhd (in Receivership) (Perwira Habib Bank Malaysia, Intervener) [1996] 2 MLJ 369; [1996] 3 CLJ 635, FC (refd)

Puspakom Sdn Bhd v Strateq Data Centre Sdn Bhd [2019] 7 MLJ 340, HC (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 3 AMR 385, CA (refd)

Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173, FC (refd)
Tweddle against Atkinson, Executor of Guy, Deceased (1861) 121 ER 762; [1861] 1 B & S 393, KBD (refd)

Legislation referred to

Contracts Act 1950 s 6(b)
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(c), (1)(d), (2), O 92 r 4
Sale of Goods Act 1957 s 27, 27(1)
Specific Relief Act 1950 ss 41, 42

Ravichandaran Selliah (S Ravichandaran & Anuar) for the plaintiff.
Habizan Rahman (Sarina Alwi with him) (Rahman Rohaida) for the first defendant.
Chuah Thiam Ming (Chuah & Yap) for the second defendant.

Mohd Nazlan J:

INTRODUCTION

[1] There are two related applications here. The first is the plaintiff's originating summons for principally, a declaration of ownership of certain computer equipment against the two defendants, and the second is the striking out application filed by the second defendant against the said originating summons pursuant to O 18 r 19(1)(b), (1)(c) or (1)(d) and/or O 92 r 4 of the Rules of Court 2012. I decided to allow the striking out application and dismissed the originating summons. These are the full reasons for my decision.

KEY BACKGROUND FACTS

[2] Unknown to and in transactions which did not concern the plaintiff, by way of an offer No 1205000098–05 dated 30 October 2012 the second defendant, as owner, rented 1,400 units of computer equipment to the first defendant for a period of 36 months. Evidenced by certain letters, the rental was subsequently extended until 29 January 2016 and further extended until 29 January 2017.

[3] Crucially, under the final extension, the first defendant had agreed to the terms and conditions in what is referred to as option C as stated in the second defendant's letter to the first defendant dated 15 March 2016. Option C stated as follows:

> Extend the rental contract without warranty for another 12 months at RM86,835.20 per month payable in advance (RM86,835.20 x 12 months = RM1,042,022.40) (Inclusive of GST) with ownership of the equipment transferable to your company upon expiry of the renewal term.

A **[4]** Significantly, at the relevant time the first defendant had also sublet the said 1,400 units of computer equipment and other computer equipment (which other computer equipment had nothing to do with the second defendant) to the plaintiff, pursuant to a leasing agreement dated 26 September 2012 between the first defendant and the plaintiff.

B

[5] The plaintiff and the first defendant subsequently entered into a sale and purchase of the certain desktop equipment where the former purchased from the latter 2,140 units of computer equipment, being 1,785 units of desktop and 355 units of laptop, which the plaintiff claimed was pursuant to a C letter of offer dated 23 February 2016, at the sale price of RM1,590,000 as finally agreed by the parties.

[6] As it happened, as between the two defendants and their business D relationship, the first defendant had failed to pay the agreed rental to the second defendant in the final extension of the rental of the 1,400 units of computer equipment. This resulted in the second defendant issuing to the plaintiff which then had possession of the 1,400 computer equipment in a letter dated 21 February 2017 entitled 'notice of repossession order' informing the plaintiff E that the first defendant had defaulted in six months rental payment from July 2016 to December 2016, and that the second defendant would as such collect the 1,400 units from the plaintiff in stages beginning 27 February 2017.

F **[7]** In other words, this was when the plaintiff first discovered that the second defendant was the owner of the computer units (the 1,400) which had been leased (then sold) to the plaintiff by the first defendant and that the equipment had been initially rented to the first defendant and subrented to the plaintiff by the first defendant.

G

[8] The plaintiff replied to the second defendant by letter dated 24 February 2017 which stated that the former had never entered into any contract with the latter in relation to the 1,400 units of computer equipment or for any other equipment, that the second defendant and/or its agent had no H right to enter any of the plaintiff's premises to repossess all or any of the computer equipment at any time and that the plaintiff would rigorously defend any legal action instituted against the plaintiff by the second defendant.

[9] Upon receipt of the plaintiff's letter, the second defendant did not I proceed to collect back the 1,400 units of computer equipment from the plaintiff. Instead the second defendant commenced a legal suit at the Kuala Lumpur Sessions Court (WA-B52NCC-226–04 of 2017) against the first defendant for all moneys due and payable by the first defendant to the second defendant in respect of the rental of the 1,400 units of computer equipment.

[10] The second defendant succeeded and obtained judgment on 28 February 2018 against the first defendant. Subsequently, the first defendant discharged all its liabilities owed to the second defendant. This is evidenced in a letter dated 16 July 2018 entitled 'letter of discharge' confirming that the first defendant had discharged all its liabilities.

[11] Since the plaintiff's letter of 24 February 2017, the second defendant never received any communication from the plaintiff until the issuance of letters from the plaintiff's solicitors, much later, dated 13 July 2020 and 24 July 2020 but now asking for the second defendant to collect the computers. The second defendant, responded through its solicitors in a letter dated 24 July 2020 which emphasised that the transaction between the first and second defendants had already been completed and that the second defendant was not privy to any transaction on the sale of computers between the first defendant and the plaintiff.

[12] There were various communication between the plaintiff and the first defendant where essentially the plaintiff demanded an undertaking letter from the first defendant regarding the ownership of the computer equipment and that the plaintiff also offered to pay RM59,466 as full settlement of the purchase price with no further claims by either party. The first defendant did not agree to either. The plaintiff persisted and asked for evidence of ownership and stated that the contract to purchase the equipment pursuant to the said letter of offer was thus void as the first defendant did not have the title on the equipment to sell to the plaintiff.

[13] As the plaintiff did not get the evidence of ownership and given the earlier claim of ownership made by the second defendant, the plaintiff proceeded to replace the computers to maintain its operation, which according to the plaintiff was a major task that could not be effected overnight.

[14] Upon replacing the same, the plaintiff issued a notice to the first defendant dated 2 July 2020 for the latter to retrieve the equipment from the plaintiff's premises. Then the plaintiff issued a similar notice to the second defendant dated 13 July 2020 and 24 July 2020 as mentioned above.

[15] The first defendant did in its letter dated 16 July 2020 inform the plaintiff that the first defendant had good title over the computer equipment which had been successfully earlier delivered to and accepted by the plaintiff, and that the first defendant had resolved its dispute with the second defendant, as evidenced by the letter of discharge dated 16 July 2018 issued by the second defendant to the first defendant.

A **[16]** As such, the plaintiff proceeded to file the instant originating summons against both defendants, for a declaration that the sale of the computer equipment by the first defendant to the plaintiff is void as the first defendant did not have the title to sell the same on 23 February 2016 as per the letter of offer issued by the plaintiff and to compel the defendants to retrieve the
B equipment, failing which the plaintiff will dispose the same either by way of a sale or as scrap.

[17] The second defendant in response filed a striking out application against the plaintiff's originating summons.
C

ANALYSIS AND FINDINGS OF THIS COURT

[18] I will discuss the two applications together, because the primary concerns are common to both although the applicable tests may be different,
D which will be emphasised when making my decisions on the key issues requiring judicial determination.

Ownership of the computers upon sale to the plaintiff

E

[19] The plaintiff argued the first defendant did not own the computers to have been able to sell them to the plaintiff despite the sale pursuant to the offer letter dated 23 February 2016. The first defendant never produced proof of ownership despite requested and this is further confirmed by the second
F defendant's notice of repossession order dated 21 February 2017 which showed that ownership at that point still remained with the second defendant.

The date of the sale

G **[20]** However evidence shows that the said letter of offer dated 23 February 2016 is not binding between the first defendant and the plaintiff because it was not accepted within the time prescribed and signed by the first defendant as required by the terms of the same. Instead the 2,140 units of computers were sold by the first defendant to the plaintiff pursuant to a purchase order
H No 4500061341 dated 27 June 2016 issued by the plaintiff as well as invoice No MSC0012/2016 for the sum of RM1,113,000, invoice No MSC0014/2016 for the sum of RM159,000 and invoice No MSC0019/2016 for the sum of RM318,000.

I **[21]** After all, para 7 of the letter of offer had clearly stated that 'sekiranya surat akuan terima tidak diterima oleh BSN dalam masa yang ditetapkan, tawaran ini akan dianggap batal'. As the first defendant did not issue any letter of acceptance to the plaintiff within the prescribed period (of seven days), it is unmistakably plain that reliance cannot be placed on the letter of offer. Instead

reference may aptly be made to s 6(b) of the Contracts Act 1950 which reads as follows:

> A proposal is revoked —
>
> (b) by the lapse of the time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance; ...

[22] Moreover, quite apart from the plaintiff's insistence on reliance on the letter of offer, the plaintiff had itself agreed to the position of the first defendant where in its letter of 24 February 2017, the plaintiff stated that the computers were sold to the plaintiff under purchase order No 4500061341 dated 27 June 2016 and again stated in its letter dated 1 August 2017 that the arrangement on the same was pursuant to a purchase order No 450061341 dated 27 June 2016.

[23] As such the sale of the 2,140 computer units (inclusive of the 1,400) was effected in pursuance of the purchase order of 27 June 2016 as confirmed further by the said invoices.

Whose computer units were sold?

[24] It is also the first defendant's position that at the time 2,140 units of computers were sold to the plaintiff in June 2016, only 1,400 out of the said 2,140 units were owned by the second defendant, whilst the remaining units of 740 units belonged to the first defendant.

[25] It is apposite that the history prior to the sale is emphasised, for it is important. Prior to the sale of the said 2,140 units of computers to the plaintiff, the same 2,140 units of computers were leased to the plaintiff by the first defendant. 1,500 units out of the 2,140 units of computers were leased to the plaintiff by the first defendant vide the leasing agreement dated 26 September 2012, with the remaining leased pursuant to letters arrangement. And in respect of the said 1,500 units of computers that were leased to the plaintiff pursuant to the leasing agreement, 1,400 units had been sold by the first defendant to second defendant by way of a sale and purchase agreement dated 30 October 2012.

[26] Subsequently, the said 1,400 units of computers were leased by the second defendant back to the first defendant on 30 October 2012. Significantly, these 1,400 units of computers that were sold to the second defendant and subsequently leased to the first defendant remained in the plaintiff's possessions. As stated earlier, pursuant to the extension letter dated 15 March 2016 from the second defendant, the first defendant had chosen to extend the lease of the said 1,400 units of computers under option C, which

A meant that the lease will be extended for another 12 months with the ownership of the said 1,400 units computers to be transferred to the first defendant upon expiry of the renewal term.

B **[27]** However, during that extension period, the rental of the said 1,400 units of computers remained outstanding for six months. This led to the second defendant issuing the said notice of repossession order of 21 February 2017 to the plaintiff to recover the said 1,400 units of computers since they were then in the plaintiff's custody. Whilst, as stated earlier, the plaintiff C expressed its refusal to allow the same, the outstanding rental was, aided by the legal proceedings initiated by the second defendant against the first defendant as referred to earlier, then fully settled by the first defendant which resulted in the second defendant issuing the letter of discharge dated 16 July 2018, also as mentioned earlier. This also meant that as per option C, ownership of the D 1,400 computer units became vested back in the first defendant.

[28] From the above it is clear that whilst the first defendant had disposed of the 1,400 computer units by way of the purchase by the plaintiff in June 2016, at that time of the sale to the plaintiff, the same were owned by the second E defendant since 2012 and leased back to the first defendant which became the owner only later in 2018 after the conclusion of the court proceedings commenced by the second defendant and as evidenced by the letter of discharge.

F **[29]** Thus in my judgment, whilst it is true that at the time of the filing of this originating summons, ownership of the 1,400 computer units in dispute was indeed vested in the first defendant, it was the second defendant who owned the same at the time of their sale to the plaintiff by the first defendant in G June 2016.

Application of the Sale of Goods Act 1957

[30] However, in my view, this is not necessarily conclusive and nor does it H mean that the declaration sought for by the plaintiff must be allowed. This is because it was in fact the plaintiff's case that at the time of the purchase transaction in 2016 of the 2,140 units of computers, the plaintiff had no knowledge that 1,400 out of 2,140 units of computers were actually owned by the second defendant. The plaintiff only got to know of the ownership of 1,400 I units of computers upon receipt of the aforementioned notice of repossession order dated 21 February 2017.

[31] This led the plaintiff at that time to believe that it had acquired good title to all the said computers, and the plaintiff persisted in this stance, and even

informed the second defendant that the plaintiff refused to allow any repossession and would defend any attempt by the second defendant to do so.

[32] This is where the provisions of the Sale of Goods Act 1957, in particular s 27(1) is of relevance. It reads:

> 27 Sale by person not the owner
>
> (1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:
>
> Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

[33] The key principle is clear enough. One cannot pass title of what one does not own. In *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413, Gopal Sri Ram JCA (as he then was) observed as follows:

> [42] Based on the authorities we have thus far discussed and applying the principles they have laid down to the facts and circumstances of the present instance, we are of the view that it was not the objective intention of the parties to the loan documents that the first defendant should be entitled to sell off the LPF shares to the second and third defendants or indeed to anyone else, before 8 January 2005. It follows that the first defendant having had no authority to sell the shares could pass no title to the second and third defendants. *Nemo dat quod non habet*. The sale by a non-owner of goods to a third party is void. See *Hollins v Fowler* [1875] Law Rep 7 HL 757. This principle is now codified in s 27 of our Sale of Goods Act 1957. None of the exceptions to s 27 apply, of course, in this case. And for completeness, we would refer to s 2 of the Act of 1957 which defines 'goods' as including stocks and shares. In this respect, our statute differs from the English equivalent.

[34] It is also of relevance to acknowledge that Peh Swee Chin FCJ, writing for the Federal Court in the case of *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener)* [1996] 2 MLJ 369; [1996] 3 CLJ 635 held:

> Personal property, otherwise known as personalty or movable property is different from real property otherwise known as immovable property or land in one important aspect for the purpose of the *nemo dat* rule, more about this later.

A Personal property includes such diverse things as money, goods, stocks and shares, cattle and choses in action.

All choses in action are categorised under personal property, examples of choses in action being stock and shares, debts (as stated above), life insurance policies, bills of lading, patents and copyrights, etc therein.

B

Subject to statutory intervention and modifications, all kinds of personal property are subject to the *nemo dat* rule from which flows the consequence that nobody can claim any personal property against the real owner of that personal property.

We are of the opinion that the operation of *nemo dat* rule to certain specific types of C personal property has been modified by statutes, and a 'debt' is NOT one of them, more about this, later.

Speaking of statutory modifications, in the case of sale of goods, the *nemo dat* principle is modified by various sections in the Sale of Goods Act 1957, such as ss 27, 29 etc therein, in which a bona fide buyer for value without notice, eg, of the D lack of title of the seller is protected in certain situations.

We may just as well mention here that choses in action are expressly excepted from the definition of the word 'goods' in the Sale of Goods Act 1957, this is to be borne in mind when speaking of choses in action in connection with the *nemo dat* rule.

E

[35] This is also affirmed by the Federal Court in the case of *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173 which concerned landed properties but where in the judgment of Arifin Zakaria CJ the underlying concept was thus explained:

F

[34] The above finding by the Court of Appeal found support in the common law rule of *nemo dat quod non habet* (*nemo dat* rule in short). The *nemo dat* rule literally means 'no-one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd* [1949] 1 KB 322 as per Denning LJ). This G is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. The *nemo dat* rule protects the true owner of the goods (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words, the right of the true owner is retained in the event of his possession is being stolen or sold to the unsuspecting purchaser. In a typical case, the H application of *nemo dat* rule involves the seller who does not own the goods has no right to sell them but nevertheless sells them to an innocent buyer. *Because of the apparent harshness of the nemo dat rule (as it is an innocent buyer who is a bona fide purchaser for value without notice stands to lose out), several exceptions to nemo dat rule were developed at common law and also have been added by statute (Sale of Goods Act 1957). One of the exceptions to nemo dat rule is when the innocent purchaser pleads* I *estoppel by asserting that the statement and conducts of the true owner have led him to believe that the unauthorised seller in fact had the right to sell the goods* (s 27(1) of the Sale of Goods Act 1957). (Emphasis added.)

[36] It is equally clear from the above that there are certain exceptions to the strict operation of this rule. A major exception is that the owner of the goods, such as the plaintiff herein, is by his conduct precluded from denying the seller's authority to sell. Having reviewed the affidavit evidence, I cannot but agree with the first defendant's submissions that the conduct of the plaintiff in this case now prevents the plaintiff from disputing, much less denying the first defendant's authority and title to sell the said computer equipment to the plaintiff.

[37] In the result, under s 27(1) of the Sale of Goods Act 1957, the plaintiff, who was a bona fide purchaser for value without notice of the second defendant's true ownership over the 2,140 units of computers (inclusive of the 1,400), had therefore acquired good title over the said computers at the time of the sale transaction between the plaintiff and the first defendant.

[38] So what is the evidence of conduct of the plaintiff that could justifiably operate as an exception to the *nemo dat quod non habet* rule as statutorily enacted under s 27(1)? This court identified four aspects.

[39] First, the plaintiff resisted the repossession attempt by the second defendant and stated its intention to defend any legal action initiated for that purpose. Secondly, prior to the filing of this originating summons, the plaintiff had on a number of occasions, offered to settle the issues between parties in an amicable manner, if the first defendant could produce evidence of ownership of all the computers sold to the plaintiff. This did not materialise.

[40] Thirdly, in accordance with the sale of the 2,140 units of computers, despite having notice of the claim by the second defendant, the plaintiff still requested the first defendant to continue to render services of corrective maintenance for two years to the plaintiff, based on an on-call basis. Not only that.

[41] Nor can the benefit of unjust enrichment favouring the plaintiff be dismissed. The computers have always been in the plaintiff's possession, which it continued to use for more than three years *after* the plaintiff's receipt of the notice of repossession order from the second defendant. Despite questioning the validity of the sale transaction, the plaintiff had requested the first defendant to provide corrective maintenance services for two years in accordance with the sale terms. In addition, in the first place, the said 2,140 units were sold to the plaintiff on the basis that the first defendant waived the outstanding rental for the month of November 2015 and December 2015.

[42] Fourthly, it needs no reminding that since the declaratory relief sought by the plaintiff is equitable in nature, the plaintiff must come to court with clean hands and make a full and frank disclosure. Also, as correctly submitted by the first defendant, the maxim *vigilantibus, non dormientibus jura subveniunt* is similarly applicable, to the effect that the law will not help those who sleep on their rights.

[43] This is also the concept of laches which is an equitable defence implying lapse of time and delay in prosecuting a claim. It is trite that a court of equity will refuse its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches.

[44] In *Bank Simpanan Nasional v Rudysham Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234, I had occasioned to say this:

> Long Delay — Appellant Guilty of Laches
>
> [80] An even more compelling basis which weakens the case of the appellant is that it leapt into action far too late in the day. The suit was only instituted in 2013. Factually, this was some more than four long years after the issuance of the full settlement letter. The appellant now claimed to be wanting to set the record straight over the alleged error committed several years in the past. I therefore apply the principle in *Tenaga Nasional Bhd v Taiko Plantations Sdn Bhd* [2011] 9 MLJ 76; [2013] 2 CLJ 229 and similarly hold that the appellant is certainly guilty of laches for having taken an unduly long time to make a claim on the alleged shortfall. The following passages from the judgment of the High Court are of relevance:
>
> > [193] Apart from what is stated above, the court is of the considered view that the plaintiff's claim against the defendant ought also to be dismissed because there are merits in the defendant's defences of limitation and laches.
> >
> > [194] Here the plaintiff's claim dates back to 13 December 1986. But the plaintiff's writ was only filed on 14 November 1994 which is a good seven years and 11 months later. The plaintiff's cause of action against the defendant is for breach of contract. The limitation period as provided for in s 6(1)(a) of the Limitation Act 1953 is six years from the date the cause of action accrued. Here that date would be 13 December 1986. So the plaintiff's claim is clearly time barred. On this ground alone, the plaintiff's claim ought to be dismissed with costs.
> >
> > [195] The plaintiff is also guilty of laches because there was an unduly long delay on the part of the plaintiff to discover the alleged wrong wiring in an area which is completely within its domain and which was also sealed off and not accessible to the defendant's workers and agents. Both the plaintiff and the defendant are companies doing business. In any business the object must be to do their trade professionally in order to supply its services as efficiently as possible to its clients in order to earn profits for the company and shareholders. It would be absurd if the plaintiff can make a mistake and keep it going for seven years and then just transfer its loss arising from its mistake to the defendant.

[81] This is far too late in the day for an action to be filed by the appellant. It is much more consistent with the presence of an afterthought. The appellant is thus patently guilty of laches.

[45] Now, here, there is a long and inordinate delay in the pursuit of this case by the plaintiff. Again, the starting point of knowledge in respect of the status of the ownership of 1,400 units of computers claimed by the second defendant was the receipt of the notice of repossession order of 21 February 2017. But it was finally only on 2 July 2020 which was a good three years and four months later that the plaintiff had actually given notice to demand the first defendant to retrieve all the computers. During all this time, the computers remained in the custody of the plaintiff and for its own use to boot.

[46] The delay has also resulted in a prejudice to the first defendant because the market value of the computers has since very considerably and drastically dropped in light of the aging of the computers, their status as being used computers, and the fact that the technology employed in the said computers is no longer the latest technology available.

[47] There are other aspects about the stance of the plaintiff that weaken its case. It is no less telling that the plaintiff in its written submissions had not disclosed that when sold to the plaintiff by the first defendant in 2016, only 1,400 out of the said 2,140 units of computers were owned by the second defendant. The other 740 never had anything to do with the second defendant. This originating summons of the plaintiff sought for reliefs in respect of the whole 2,140 units against both defendants in one indiscriminate broad brush.

[48] Further despite the plaintiff claiming having to make a major purchasing and replacement exercise to acquire new computers in place of the 2,140 units, the plaintiff chose not to produce any documentary evidence of its alleged major replacement of acquiring these new computers.

[49] The prayers for declaratory orders against the defendants therefore cannot succeed.

The striking out application by the second defendant

[50] The second defendant is applying for the striking out of the claim of the plaintiff under O 18 r 19(1) of the Rules of Court 2012 ('the RC 2012'). The starting point of reference must therefore be O 18 r 19(1) of the RC 2012 which relevant provisions read as follows:

19 Striking out pleadings and endorsements (O 18 r 19)

A (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be;

B (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

C and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a) ...

D **[51]** The second defendant premised its applications on limbs (b), (c) and (d). Thus it was stated that the claim by the plaintiff was frivolous, vexatious, delaying a fair trial and otherwise tantamount to an abuse of court process.

E **[52]** The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

> F The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised by a G minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari H materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson)* . The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

I **[53]** It is therefore well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see also the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520). It is also only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

[54] It is also well settled that as for limb (a) and as stated in O 18 r 19(2) above, examination could only be made of the pleadings, not the affidavits evidence, but where the application is premised on more than one ground under O 18 r 19(1), like in the present case, the court should ignore the affidavits affirmed in relation to the other grounds when dealing with limb (a) which ought to be considered first, before examining the affidavit evidence under the other limbs (see *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385).

[55] The second defendant's application for striking out the originating summons is well founded. For it is based on the contention that the second defendant is not a party to and it has no privity to any discussion, agreement and contract between the plaintiff and the first defendant in respect of the said 1,400 computer units.

[56] The second defendant is also consistent with the position taken by the first defendant, contended that it is the first defendant and not the second defendant who is the present owner of the 1,400 units of computer equipment being the subject matter of the previous rental transaction between the second defendant as the provider of the computer equipment for rental and the first defendant as the hirer. When the first defendant discharged its liabilities to the second defendant, as evidenced by the letter of discharge the ownership of the 1,400 units of computer equipment were transferred to the first defendant in accordance with the agreement between the two in the final rental extension. The plaintiff is also well aware before the filing of the instant originating summons that the plaintiff is not the owner of and has no rights over the computers in question.

[57] This court cannot countenance a departure from the well-entrenched rule in the law of contract that a third party can neither benefit nor suffer from a contract executed by other parties. A contract cannot be enforced against or by a third party (see the leading common law authority of *Tweddle against Atkinson, Executor of Guy, Deceased* (1861) 121 ER 762; [1861] 1 B & S 393 and the Privy Council decision in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170). The law thus treats the second defendant as a stranger to the sale transaction of the computer units between the plaintiff and the first defendant.

[58] There is no dispute that the second defendant too correctly submitted that the first defendant itself has also expressly stated that it is the first defendant, and not the second defendant, who is now the owner of the 1,400 units of the said computer equipment. The first defendant has so expressly affirmed in the first defendant's affidavit in reply (encl 9) that the first defendant is the owner of the 1,400 units of the computer equipment. This

absolutely renders any prayers for the second defendant who is crystal clearly not the current owner and devoid of any rights to the 1,400 units of computer to repossess the same wholly untenable.

[59] It is thus not for the plaintiff who is not a party to the previous transaction between the two defendants in respect of the 1,400 computer units (or the entire 2,140 for that matter) and who is also not a party to the suit concerning the two, to now challenge and deny what has been agreed between the defendants. Further the first defendant's letter dated 16 July 2020 to the plaintiff's solicitors clearly asserted the first defendant 'has good title over the computer equipment stipulated in your client's *pesanan belian* dated 27 June 2016 No 4500061341 and letter of offer dated 23 February 2016 No PPAU 21/16' which also enclosed a copy of the letter of discharge of 16 July 2018 makes it demonstrably manifest that the plaintiff had this information and thus knowledge before the filing of the instant originating summons.

[60] Further, it must be reiterated whilst there were 2,140 units of computer equipment which was sold to the plaintiff in June 2016, only 1,400 units of computer equipment out of that which was once belonged to the second defendant until 2018 as confirmed by the letter of discharge.

[61] And no evidence has been led by the plaintiff (see *Puspakom Sdn Bhd v Strateq Data Centre Sdn Bhd* [2019] 7 MLJ 340) to demonstrate that the second defendant is now still the owner of the 1,400 units subject to the prior completed rental transaction between the defendants, what more in respect of the entire 2,140 units of computer equipment.

[62] At the same time, no explanation has been furnished by the plaintiff to explain its conduct in continuing to discuss the purchase of the computers and on the long delay before the filing of this originating summons on 1 September 2020.

[63] In the period of about three years five months from the second defendant's letter dated 21 February 2017 to the plaintiff to demand repossession until the plaintiff's solicitors' letter dated 2 July 2020 to the first defendant, the plaintiff did not request the defendants to recover the said computers but instead continued to use them. Neither did the plaintiff terminate the sale agreement on the same with the first defendant. The plaintiff had thus by its own conduct admitted to the validity of the sale and purchase between the first defendant and the plaintiff, the latter's rights to the computer equipment, and that the second defendant is not the owner of and has no rights to the same or any number thereof.

[64] The plaintiff's conduct in the three years and five months prior was most inconsistent with if not totally contradictory to the orders now prayed for in this originating summons. In this respect, by way of analogy, in *Great Eastern Life Assurance (M) Bhd v Poobalan a/l Rajah* [2019] 10 MLJ 1, I stated thus:

> [71] And the defendant does not deny signing these authorisations. He cannot now object to the disclosure of the documents or information obtained by the plaintiff from the doctors, hospitals and other organisations.
>
> [72] In my view, the legal principle of estoppel should rightfully operate to prevent and disapprove of the inequitable conduct of the defendant in attempting to mount such a challenge at this juncture. Reference ought to be made to the decision of the Court of Appeal in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, which held as follows:
>
> > We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
> >
> > To put it another way, the appellant, by its silence coupled with other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having do so, it ought not to be permitted to now contend otherwise. It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and it is now beyond question. See *Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331.

[65] As such it is clear that based on the affidavits filed on behalf of the plaintiff, it has not shown a case against the second defendant and particularly failed to demonstrate that the second defendant presently has any right to any of the computer equipment or that the second defendant is a party to the agreement for the sale and purchase of the same between the first defendant and the plaintiff.

[66] The mention by the plaintiff in the intitulement to the originating summons that it is made pursuant to ss 41 and 42 of the Specific Relief Act 1950 is also misconceived. For it has not been shown, let alone explained in what fashion the claim of the plaintiff comes within the ambit of these statutory provisions which concern the powers of the court to grant declaratory reliefs to any person entitled to any right as to any property as against any person denying the same. The plaintiff here is not claiming to be entitled to the said computers. This is no basis for any cause of action against the second

defendant and neither does it show any nexus to the prayers applied for by the plaintiff.

[67] No less irregular was the amendments effected subsequently by the plaintiff to the intitulement by removing references to these very statutory provisions, unilaterally and without the consent of the court and of parties (see the Court of Appeal decision in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457).

[68] Other than that, the plaintiff therefore does not have a valid cause of action in law against the second defendant, the above analysis also shows that the claim of the plaintiff is predicated on a basis which is nothing better than tenuous. It is difficult not to agree with the contention of the second defendant that the claim for declaration on the ownership of the computers against the second defendant is frivolous and vexatious, and bordering on being an abuse of process. Whilst the pleadings may disclose a cause of action however trifling and weak, it is without a doubt that when affidavit evidence is considered for the purposes of limb (b), (c) and (d) of O 18 r 19(1) the originating summons is manifestly frivolous, scandalous or vexatious, and they would also delay a fair hearing and otherwise amount to an abuse of process.

[69] In other words, this claim by the plaintiff against the second defendant is so obviously and conspicuously unsustainable within the meaning ascribed to it by the Supreme Court in *Bandar Builder*. It is obviously unsustainable and eminently suited for summary disposal by way of striking out under O 18 r 19(1) of the RC 2012.

CONCLUSION

[70] In view of the foregoing reasons, I find that the second defendant has established its case to have the claim against it struck out under O 18 r 19(1) of the RC 2012 whilst the plaintiff has failed to prove its case to justify this court granting the declaration as prayed for. The application to strike out the originating summons against the second defendant is allowed and the claim of the plaintiff in the originating summons is dismissed.

Second defendant's striking out application allowed and plaintiff's application dismissed.

Reported by K Selvaraj